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No. 09-1151

Supreme Court, U.S.
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In The
Supreme Court of the United States

JERRY L. BALDWIN,

Petitioner,

versus

THE BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA SYSTEM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The First Circuit Court Of Appeal For The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

After compiling a win-loss record of 6-27 over three years, Jerry Baldwin was relieved of his duties as head football coach at the University of Louisiana at Lafayette ("ULL") and paid for the remaining year of his contract. He sued ULL's board of supervisors and its athletic director, Nelson Schexnayder, under the theory that Schexnayder and longtime ULL President Ray Authement, acting out of racial animus, hired him as ULL's first black head football coach only to set him up to fail and destroy his career.

A jury unanimously found that Baldwin was *not* fired "because of" his race, but by a vote of nine to three, the jury found that his race was a "determining factor" in the firing.[1] The jury also found for Baldwin on a few of his other claims, including breach of contract, and awarded him more than $2 million.

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[1] The specific interrogatories regarding the discrimination claim were as follows:

1. Do you find by a preponderance of the evidence that

   Defendant, Board of Supervisors for the University of Louisiana System terminated Plaintiff, Jerry Baldwin, because of his race?

   _____Yes _____No

2. Do you find by a preponderance of the evidence that Coach Baldwin's race was a determining factor in his termination by the Board of Supervisors for the University of Louisiana System?

   _____Yes _____No

ULL and Schexnayder asked the Louisiana First Circuit Court of Appeal to decide the case on the merits and render judgment in their favor, on the grounds that Baldwin failed to produce any evidence supporting his claims other than his counsel's speculation that his gripes over his working conditions could somehow be explained by racial animus. Despite the record being complete, the court of appeal declined to rule on the merits. Instead, the court threw out the verdict and remanded the case to the trial court for a new trial, on several grounds:

1. the trial court improperly sustained a *Batson* challenge and seated a juror who admitted during *voir dire* that she believed herself to be, like Baldwin, the victim of unresolved race-based employment discrimination at the hands of her State employer;

2. the trial court improperly allowed former LSU chancellor Bud Davis to testify as an expert that Baldwin should have been given the option of resigning instead of being fired (despite the contract's language enabling ULL to fire him at any time) and that the firing damaged his future prospects, even though Davis admitted that his views on these critical issues were just his personal opinions that were unsupported by any testing or other foundation;

3. the trial court improperly issued a judgment for Baldwin on the discrimination

claim even though the jury's confusing verdict could only be construed as either a negative finding on that claim or an incomplete verdict; and

4. the trial court improperly issued a judgment on two of Baldwin's claims (intentional interference with contract and negligent infliction of emotional distress) despite jury polling showing that Baldwin did not receive the requisite nine votes on either of these claims.

Of these four reversible errors found by the state court, Baldwin addresses only the third in his application to this Honorable Court. Specifically, he argues that under Title VII, the jury's "Yes" vote on the "determining factor" question is sufficient to constitute a finding for him on the discrimination claim, and that the reason the appellate court found to the contrary is that it applied Louisiana's anti-discrimination statute instead of Title VII. According to Baldwin, Louisiana's statute is outdated because it doesn't reflect 1991 amendments to Title VII that make a "yes" vote on a "mixed-motives" question a sufficient basis for a judgment of discrimination.

As demonstrated below, Baldwin fails to offer a proper basis for granting his writ. There is no real issue as to whether state law or Title VII applies, because Louisiana law does not differ in any relevant way from Title VII with respect to mixed-motives claims. Second, any error in the court of appeal's mixed-motives analysis is harmless because even if

the jury's "yes" answer to the "determining factor" interrogatory were, in itself, a "complete" verdict on the discrimination claim, that verdict hopelessly conflicts with the jury's unanimous finding that Baldwin was *not* fired because of race.

ARGUMENT

1. There is no preemption issue because Louisiana's antidiscrimination statute does not differ from Title VII in any relevant way concerning "mixed-motives" discrimination claims.

Baldwin attempts to frame the question before this Court as whether Louisiana's antidiscrimination statute is preempted by Title VII to the extent that Louisiana's statute conflicts with Title VII and imposes an obstacle to Title VII's purposes regarding "mixed-motives" discrimination claims. This question, however, is based on the flawed assumption that there are significant differences between Louisiana's statute and Title VII regarding how mixed-motives claims are analyzed. There are no differences in those statutes that matter to this case.

The prohibitory language in Louisiana's statute is practically identical to that in its federal counterpart. *Compare* LA. REV. STAT. ANN. § 23:332(A)(1) (West 2009) (making it unlawful to "[i]ntentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any

individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin") *with* 42 U.S.C.A. § 2000e-2(a)(1) (Bender 2010) (making it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"). This language has been interpreted by both federal courts and Louisiana state courts as barring employment practices where the protected characteristic is a "motivating factor," even though other factors motivated the practice. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S. Ct. 1775, 1795, 104 L. Ed. 2d 268 (1989); *Morgan v. New Orleans Pub. Facility Mgmt.*, 97-0211, p. 3 (La. App. 4 Cir. 11/26/97); 703 So.2d 182, 184 (applying the *Price Waterhouse* "mixed-motives" analysis to Louisiana law).

The jurisprudentially recognized theory of "mixed motives" was later expressly encoded in Title VII with the Civil Rights Act of 1991. *See* 42 U.S.C.A. § 2000e-2(m) (Bender 2010) ("Except as otherwise provided in this title . . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.") Because mixed-motives claims were *already* recognized by the jurisprudence, the enactment of § 2000e-2(m)

merely made explicit what was already implicit in the law.

For this reason, no particular significance can be attached to the fact that Louisiana did not amend its statute to include express mixed-motives language. Louisiana law still implicitly recognizes mixed-motives claims, while federal law explicitly recognizes them. Louisiana law thus remains in sync with federal law.

The Civil Rights Acts of 1991 did change the federal law of mixed motives in one respect that is not relevant to this case. Specifically, federal law now provides a limited affirmative defense for the employer: if the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor," the plaintiff *cannot* be awarded any damages (though declaratory relief, limited injunctive relief, and attorney's fees can be awarded). *Id.* § 2000e-5(g)(2)(B). Again, however, a similar affirmative defense was *already* recognized in *Price Waterhouse*, where six justices of this Court found that an employer could avoid liability by proving, by a preponderance of evidence, that it would have made the same decision absent consideration of the illegitimate factor. *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *id.* at 259-61 (White, J., concurring); *id.* at 279 (O'Connor, J., concurring).[2]

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[2] While the six justices agreed that a showing of an unlawful motive caused the burden to shift to the employer to prove that it would have made the same decision absent

(Continued on following page)

Thus, the *only* change to the law of mixed motives that was effected in 1991 is that an employer who proves that it would have taken the same action in the absence of the impermissible motivating factor, though still absolved of having to pay damages, can now be liable for declaratory relief, some injunctive relief, and attorney's fees. Of these remedies, none are relevant to Baldwin's writ application, because he does not seek declaratory or injunctive relief, and the Louisiana courts have not awarded him any attorney's fees.

Baldwin erroneously suggests that the law of mixed motives was further changed by interpretations of the 1991 amendments to Title VII, particularly by this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). But *Desert Palace* did not change the law of mixed motives; rather, it merely clarified the plaintiff's evidentiary burden in a mixed-motives case. The source of the confusion was Justice O'Connor's

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consideration of the impermissible factor, there was some disagreement as to the nature of the showing required by the plaintiff. The plurality of four justices imposed no limitations on the type of proof and simply required a showing that race was an impermissible motivating factor *Price Waterhouse*, 490 U.S at 251-52 (plurality opinion). Justice White would have required that the plaintiff show that the unlawful motive was a "substantial factor" in the employer's decision. *Id.* at 259 (White, J., concurring). Justice O'Connor believed that a plaintiff should be required to show by direct evidence that the unlawful motive was a substantial factor in the decision. *Id.* at 276 (O'Connor, J., concurring). All agreed on the basic burden-shifting framework.

concurring opinion in *Price Waterhouse*, where she opined that a mixed-motives plaintiff must produce "direct" evidence of discrimination before shifting the burden to the employer to show that it would have made the same decision absent the illegitimate factor. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring). Some appellate courts agreed with Justice O'Connor, while other courts, following the plurality in *Price Waterhouse*, imposed no "limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Id.* at 251-52. The split was resolved in *Desert Palace* when this Court held that a mixed-motives plaintiff need not produce direct evidence of discrimination to be entitled to a "mixed-motives" jury instruction. *Desert Palace*, 539 U.S. at 95, 101-02. *Desert Palace* simply *agrees with* the plurality in *Price Waterhouse* on this point. It does not change the law.

Because neither the Civil Rights Act of 1991 nor the subsequent interpretative jurisprudence represents a significant departure from the pre-1991 law of mixed motives as articulated in *Price Waterhouse*, Baldwin could not have been prejudiced by the state court of appeal's determination that the Louisiana law of mixed motives is governed by *Price Waterhouse*. Since there is no relevant difference between the holding of *Price Waterhouse* and the current federal law of mixed motives, there is no conflict between the standard applied by the court of appeal and current federal law, and thus no reason for this Court to determine whether Louisiana's supposedly

outdated mixed-motives law has been preempted by Title VII. Without a conflict, there is no need for a preemption analysis.

Baldwin complains that the state court of appeal relied on "the shifting burden analysis outlined in *Price Waterhouse*" rather than the amended federal statute. (Pet. Writ Cert. at 14-15.) His unstated assumption is that the burden-shifting analysis has changed. And in fairness, the court of appeal does seem to agree the burden-shifting framework has changed: it found that while the jury's "yes" answer to the "motivating factor" interrogatory "may" constitute a mixed-motives verdict under current federal law, such a finding would be an "incomplete" verdict under Louisiana law, because Louisiana law, following *Price Waterhouse*, also requires an additional finding that the employer would have made the same decision absent the impermissible motivating factor. (Ct. App. J. at 20.)

This reasoning – and the assumption that Baldwin derives from it – is faulty, because the burden-shifting framework described in *Price Waterhouse* has never been abrogated, either legislatively or jurisprudentially. Under *Price Waterhouse*, if a plaintiff offered proof that a protected characteristic was a motivating factor in an employment decision, the burden shifted to the employer to prove that it would have made the same decision absent the impermissible motivation. *Price Waterhouse*, 490 U.S. at 250. This is still true under current federal law. 42 U.S.C. § 2000e-5(g)(2)(B). While this affirmative

defense under current federal law is a bit more limited in the sense that it sharply limits the remedies available rather than completely bars the claim, nothing in the 1991 amendments or the subsequent jurisprudence of this Court modifies the overall burden-shifting framework or any related requirements for jury interrogatories that map that framework.

Given that the relevant law has not changed, the result should be the same regardless of whether the verdict form is analyzed under the *Price Waterhouse* standard or under current Title VII. If it was error for the court of appeal to find that the jury's "yes" answer to the "determining factor" interrogatory was not, considered in isolation, a "complete" verdict, the error was a simple misapplication of the law – not a result of the court's applying the "wrong" law. Regardless of whether Louisiana law looks to pre-1991 jurisprudence, it does not conflict with current federal law. Absent a conflict, this Court has no reason to consider whether the federal law of mixed motives preempts Louisiana law.

2. The state Court of Appeal's ultimate finding that the jury's answers do not support a verdict of discrimination is correct because the jury's 9-3 finding that race was a "determining factor" in Baldwin's firing cannot supercede its unanimous finding that Baldwin was not fired "because of" his race.

Even if the state court of appeal was wrong in finding that the "yes" answer to the "determining factor" interrogatory was insufficient to constitute a verdict of mixed-motives discrimination, the court of appeal was certainly correct in finding that the jury's answers to interrogatories, taken *together*, do not support a verdict of discrimination. This is because the jury unanimously found that Baldwin *was not* fired "because of" his race, and this finding hopelessly conflicts with any "verdict" for Baldwin on mixed-motives discrimination.

Mixed-motives discrimination is a species (or subset) of discrimination, so no employer can be liable for mixed-motives discrimination while simultaneously not being liable for discrimination because of race. The contradiction cannot be reconciled. Therefore, the mixed-motives "verdict" cannot possibly stand. *See* LA. CODE CIV. PROC. ANN. art. 1813(E) (West 2009) (barring courts from entering a judgment when any answers to interrogatories are inconsistent with the general verdict).

The only way that the contradiction could be reconciled is if the jury's finding that race was a

"determining factor" in the firing somehow overrides the jury's unanimous finding that Baldwin was not fired because of race. But if either interrogatory must control over the other, surely the "because of race" question trumps, given that it is the only question that tracks the statutory language (of both Title VII and Louisiana's statute) making it unlawful to fire someone "because of" race.

The irreconcilable conflict between the jury's answers is further revealed by an analysis of the word "determine." "Determine" means "to fix conclusively or authoritatively," or "to direct or control." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 616 (3d ed. 1961). Thus, in a firing context, a determining factor is something that fixes, directs, or controls the firing; the firing is done "because of" the "determining factor." In this context, there is no difference between the two expressions.

Moreover, "determining factor" does not mean the same thing as "motivating factor," and thus is inappropriate language for a true mixed-motives verdict form. As can be inferred from the definition given above, to say that race was a "determining factor" in a firing necessarily implies that race was a *dispositive* factor in the firing. But there is no such requirement (and never has been) in the law of mixed motives. *See Price Waterhouse*, 490 U.S. at 240 (rejecting a requirement that a plaintiff show that the impermissible factor was a "but for" cause of the employer's decision); *see also* 42 U.S.C. § 2000e-5(g)(2)(B) (allowing certain

forms of liability even when the employer shows that the impermissible motivation was not dispositive of its decision). Because a "determining factor" interrogatory, unlike a true mixed-motives interrogatory, does not allow for the possibility that race was a factor but not a dispositive factor, the "determining factor" interrogatory is just an awkward restatement of the "because of race" interrogatory. The two interrogatories ask the same thing, so contradictory answers to these essentially equivalent questions cannot support a judgment.

Thus, even assuming that the state court of appeal erred in holding that the jury's finding that race was a determining factor in Baldwin's firing did not, in itself, constitute a "complete" mixed-motive verdict, any such error was irrelevant. A "verdict" for Baldwin on the mixed-motives claim is plainly inconsistent with the verdict that he was not fired because of his race. The court of appeal correctly found that the jury's answers, taken as a whole, cannot support a judgment of racial discrimination.

CONCLUSION

The state court of appeal was certainly correct in holding that the jury's answers to interrogatories do not support a judgment of a discriminatory firing. Even if the court of appeal was wrong in concluding that the jury's "yes" answer to the "determining factor" question was not a verdict for Baldwin, any such

"verdict" cannot support a judgment for Baldwin because it hopelessly conflicts with the jury's unanimous finding that Baldwin was *not* fired because of his race. Thus, if there was any error in the court of appeal's mixed-motives analysis, the error was harmless, and hardly forms a "compelling" basis for this Court to grant Baldwin's writ application. And there is no preemption issue because there is no conflict between the law that was applied and the law that Baldwin thinks should have been applied. This Court should therefore deny this writ application, taxing all costs to Baldwin.

Respectfully submitted,

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